83-92

IN THE

Supreme Court of the United States

No.....

MARY J. LARSEN,

PETITIONER,

V.

FERRIS A. KIRKHAM, individually and in his capacity as President of the L.D.S. Business College, et al.,

RESPONDENTS,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Attorneys for Petitioners
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(801) 532-1150

APRIL 18, 1983

QUESTIONS PRESENTED FOR REVIEW

1. Is the Utah state statute which exempts religious educational institutions completely from all of the prohibitions of discrimination based upon color, sex, religion and country of origin, which prohibitions are found in the Equal Employment Opportunity Act, 42 U.S.C. Sections 2000e et seq. (Title VII), in impermissible conflict with federal law?

2. Does the Equal Employment Opportunity Act, 42 U.S.C. Sections 2000 e et seq. (Title VII) apply to religious organizations, or associations, religious corporations sole, or any corporation or association constituting a wholly owned subsidiary or agency of any religious association or organization or religious corporation sole?

3. Are religious organizations or associations, religious corporations sole, or any corporation or association constituting a wholly owned subsidiary or agency of any religious association or organization or religious corporation sole "employers" as defined by the Equal Employment Opportunity Act, 42 U.S.C. Section 2000 et seq. (Title VII)?

4. Whether the provisions of the Equal Employment Opportunity Act, 42 U.S.C. Sections 2000(e) 1 and 2000(e) 2 exempting religious organizations from certain requirements of the statute are unconstitutional because they are in violation of the First Amendment or the Fifth Amendment to the United States Constitution.

5. Whether the provisions of Utah Law, insofar as they exempt religious organizations and their subsidiary corporations from the operation of the Anti-discrimination statute and exclude them from the definition of "employer", are unconstitutional because they are in violation of the

First Amendment, the Fifth Amendment and the Fourteenth Amendment to the United States Constitution?

6. Were the defendants, in failing to retain or rehire the petitioner, acting "under color of any statute, ordinance, regulation, custom or usage of any state or territory" within the meaning of 42 U.S.C. Section 1983?

7. Whether 42 U.S.C. Section 1985(3) prohibits conspiracies motivated by invidious discriminatory intent not involving racial bias, and whether the defendants violated the provisions of that law with regard to the petitioner.

8. May a state statute which is unconstitutional on its face and which is in conflict with federal law be correctly applied to the petitioner's charge of discrimination and be the basis of a valid ruling?

PARTIES

All parties to this proceeding in the lower court, whose judgment is sought to be reviewed, are listed as follows: MARY J. LARSEN, Petitioner v. FERRIS A. KIRKHAM, individually and in his capacity as President of the L.D.S. Business College, NEAL A. MAXWELL, individually and in his capacity as Commissioner of Education for The Church of Jesus Christ of Latter-day Saints, THE CORPORATION OF THE PRESIDENT OF THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, L.D.S. BUSINESS COLLEGE, a nonprofit Utah corporation, JOHN R. SCHONE, individually and in his capacity as Utah State Industrial Commissioner, UTAH STATE INDUSTRIAL COMMISSION, a department of the government of the State of Utah, THE HONORABLE VERNON B. ROMNEY, in his capacity as the Attorney General for the State of Utah, THE HONORABLE CALVIN L. RAMPTON, in his capacity as Governor of the State of Utah, Respondents.

The Utah State Industrial Commission, its chairman, the Utah Attorney General and the Governor of Utah were joined as defendants only in connection with the declaratory relief sought.

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HISTORY OF THE CASE BELOW

On October 31, 1973, the petitioner filed a discrimination charge with the Anti-discrimination Division of the Utah State Industrial Commission as provided by Utah Statute.

The charge was brought to the attention of the defendant employer, the L.D.S. Business College, which responded in writing in answer to the charge, ". . . that the definition of 'employer' in Utah's Anti-discrimination Act exempted institutions such as the college."

The Utah State Industrial Commission agreed with the College and declined to hold an investigatory concilliation hearing as would have been the usual practice by statutory authority. (*See* Appendix A and Appendix B.)

On January 7, 1974, the EEOC assumed jurisdiction of petitioner's charge.

On July 1, 1974, the EEOC failed to investigate or proceed upon petitioner's charge and issued its notification of right to sue. (*See* Appendix C.)

An action was commenced on September 18, 1974 in the United States District Court for the District of Utah, Central Division, over which The Honorable Willis W. Ritter presided. Judge Ritter took the case under advisement, but died prior to rendering a decision.

In November of 1977, the case was assigned to the Honorable Fred M. Winner, Chief Judge of the District of Colorado, sitting by designation in the District of Utah. Judge Winner withdrew from the case.

Subsequently, the parties stipulated that certain questions of law should be decided and certain pertinent facts could be agreed upon. The stipulated facts concluded that the petitioner had been discharged due to religious dis-

crimination and that the defendant employer was controlled by a religious organization.

Judge Jenkins entered judgment in favor of the defendants on September 26, 1980. (*See* Appendix D.) *Larsen v. Kirkham*, 499 F. Supp. 960 (1980).

Petitioner appealed to the United States Court of Appeals, Tenth Circuit, and the District Court's decision was affirmed in a per curiam decision on December 20, 1982. (*See* unpublished opinion at Appendix F.)

A motion for rehearing was timely filed and said motion was denied on January 18, 1983. (*See* Appendix G.)

JURISDICTION

This is a civil case. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1) to review the decision of the United States Court of Appeals, Tenth Circuit. This petition was filed within ninety days of the lower court's denial of petitioner's motion for a rehearing.

STATUTES AND CONSTITUTIONAL PROVISIONS

STATUTES

1. Petitioner challenges the validity of the following provision of the Equal Employment Opportunity Act, 42 U.S.C. Section 2000e (1):

> This subchapter shall not apply to an employer with respect to employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.

Section 2000(e) (2):

2. Petitioner challenges the validity of the following provision of the Equal Employment Opportunity, 42 U.S.C. Section 2000(e) (2):

> (2) It shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or instution of learning is directed toward the propagation of a particular religion.

3. Petitioner challenges the validity of the following Utah Anti-discrimination Act Section 34-35-2 (5), Utah Code Annotated (1953):

34-35-2. Definitions. — As used in this act:

• • •

> (5) The word "employer" means the state or any political subdivision or board, commission, department, institution or school district thereof, and every other person employing 25 or more employees within the state; but it does not include religious organizations, religious corporations sole, nor any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole, a bona fide private membership club (other than a labor organization).

4. Petitioner challenges the validity of the following Utah Anti-discrimination Act, Section 34-35-6 (2) (b), Utah Code Annotated (1953):

> It shall not be a discriminatory or unfair employment practice: (b) For a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in subsantial part, owned, supported, controlled or managed by a particular religious corporation, association or society, or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Petitioner asserts her claim to a hearing under Section 34-35-5, Utah Code Annotated (1953). (*See* Appendix A.)

6. Petitioner asserts her claim under 42 U.S.C. Section 1983, which provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law suit in equity, or other proper proceeding for redress.

7. Petitioner asserts her claim under 42 U.S.C. Section 1985 (3):

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State

or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified persons as an elector for President or Vice-President, or as a member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators. (R.S. § 1980.)

AMENDMENTS TO THE UNITED STATES CONSTITUTION

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness

against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action by a former teacher at the L.D.S. Business College against the College, the Corporation of the President of the Church of Jesus Christ of Latter-day Saints, the Church's Commissioner of Education, the President of the College, and the State of Utah.

The petitioner claims that she was discriminated against because of her religion in connection with her employment at the college. Plaintiff also claims she was not allowed the free exercise of her own religion. Plaintiff seeks relief under the provisions of the Equal Employment Opportunity Act; damages under Civil Rights Act of 1871 (42 U.S.C. 1893 and 1895(3)); and a declaratory judgment as to the interpretation and constitutionality of those provisions exempting and excluding certain religious organizations, educational institutions, and other businesses from provisions of the Equal Employment Opportunity Act.

Prior to being employed full time, plaintiff was required to be interviewed by one of the general authorities of the

Church of Jesus Christ of Latter-day Saints. Subsequently, there was an investigation into the petitioner's church attendance, tithing, and general church activities. This investigation was performed by contacting certain block teachers in her neighborhood, her bishop, and other officials of the church. A number of additional contacts and reports were carried out during her employment which petitioner claims violated her privacy.

The petitioner was placed on probation until her church activity, including paying tithing increased, but her church activity was ultimately found to be unsatisfactory and she was discharged. The petitioner was, in fact, a member of the Church of Jesus Christ of Latter-day Saints, but she wished to worship and observe her faith according to her own beliefs.

REASONS FOR GRANTING THE WRIT

The issues in this case are substantial in that numerous complaints reflecting upon the meaning of the religious exemptions of the Equal Opportunity Act are filed each year. Questions concerning the constitutionality of the federal exemptions have been raised by the federal circuit courts.

Presently pending cases, filed in Utah, challenge the constitutionality of Utah's Anti-discrimination Act.

The State of Utah has encouraged discrimination based on race, color, sex, religion, ancestry and national origin.

ARGUMENT

In *King's Garden, Inc. v. F.C.C.*, 498 F.2d 51, 57 (D.C. Cir. 1974), the court took the position that the religious exemptions were violative of the United States Constitution:

> In addition to being vulnerable on First Amendment grounds, the 1972 exemption appears unconstitutional on Fifth Amendment grounds as well. To the extent that the non-religious commercial enterprises of religious organizations directly compete with those of non-religious organizations, the 1972 exemption forced the government to discriminate between business rivals in applying the Civil Rights Act's constraint upon sectarian hiring. The criterion of discrimination—*i.e.* the religious or nonreligious character of owning or operating group—not only lacks a rational connection with any permissible legislative purpose, but is also inherently suspect. Such invidious discrimination violates the equal protection of the laws guaranteed by the Due Process Clause.

The Court continued:

> . . . we cannot conceive what secular purpose is served by the unbounded exemption enacted in 1972. As for the "primary effect," the exemption invites religious groups to impress a test of faith on job categories, and indeed whole enterprises, having nothing to do with the exercise of religion.

In this case petitioner seeks recovery under 42 U.S.C. Section 1983. The record is clear that plaintiff was not rehired by L.D.S. Business College because of her religious activities or manner in which she desired to express her religion.

Thus, the free exercise of her religion is a "right, privilege, or immunity" secured by the Constitution of the United States. Cf. *Action v. Gannon,* 450 F.2d 1227, 1233 (8th Cir. 1971). The Supreme Court in *United States v. Seeger,* 380 US 163 (1965), held that the principal test for determining whether a conscientious objector's beliefs were religious was "A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by God of those admittedly qualifying for the exemption." Thus,

intensely personal convictions, which some might find "incomprehensible" or "incorrect" came within the meaning of "religious belief."

The only substantial question in connection with the Section 1983 claim is whether the defendants acted "under color of any statute, ordinance, regulation, custom, or usage, of any state or territory."

In *Burton v. Wilmington Parking Authority*, 365 US 715 (1961), the United States Supreme Court recognized that:

> A precise definition of state action has never been formulated. To fashion and apply a precise formula for recognition of state responsibility is an impossible task. Only by sifting facts and weighing circumstances can the non-obvious involvement of the state in private conduct be attributed to its true significance.

Other Courts have stated: "Private conduct may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 US 296 (1966). But, there must be a connection between the state and the private activity that caused the harm. There must be a nexus between the alleged unconstitutional activity and the purported government involvement. *Powe v. Miles*, 407 F.2d 73 (2nd Cir. 1968).

State action has been found in cases in which the state, through statutory enactment, has participated in or at least encouraged the particular private conduct complained about. In *Coleman v. Wagner College*, 429 F.2d 1120 (2nd Cir. 1970), the plaintiff was seeking recovery under Section 1983 against a private denominational college. The district court dismissed the action, but on appeal the court of

appeals noted that a recently enacted state education law which required all colleges to promulgate their disciplinary regulations as a condition for receiving any state aid, might well have encouraged the defendant college to adopt more stringent rules than it otherwise would have. If there was such encouragement, the court said, then the regulations would be state action.

In *Culbertson v. Leland*, 528 F2d. 426 (9th Cir. 1975), the plaintiffs had brought action under 42 U.S.C. Section 1983 against a hotel keeper who had seized their property under the Arizona Innkeeper's Lien Statute. There was no contention that the defendants were acting otherwise than as private persons, but the court saw "color of state law" in the Arizona statutory scheme.

A classic law school case where a prohibited state involvement was found where the state only encouraged, rather than commanded, discrimination is *Yick Wo v. Hopkins*, 118 US 356 (1886). See also, *Robinson v. Florida*, 378 US 153 (1964); *Anderson v. Martin*, 375 US 399 (1964); *Barrows v. Jackson*, 346 US 249 (1953); *McCabe v. Atchison, Topeka & Santa Fe RR Co.*, 235 US 151 (1914).

Reitman v. Mulkey, 387 US 369 (1967), although not arising under the Civil Rights Act, is significant on the question of what constitutes state action and when an *exemption* is an encouragement by the state.

In that case, this court took the position that the state of California had no obligation to enter the field of private housing to prohibit discrimination. But once it had done so and sought to regulate a once private sphere, the overturning of those anti-discrimination regulations was an encouragement to discriminate, and the right to discriminate was embodied in law.

In the present case, the State of Utah has entered the employment discrimination feld. The Utah Anti-discrimination Act generally prohibits discrimination in employment on account of race, color, sex, religion, ancestry, or national origin. But, it has defined "employer" in such a way as to exclude religious organizations or associations, religious corporations sole, any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole, a bona fide private membership club (other than a labor organization). *See* 34-35-2(5) Utah Code Annotated (1953). Employees of religious employers in Utah are denied the right to be free from discrimination and denied a procedural due process right to a hearing.

By virtue of the foregoing statutory provisions of Utah's Anti-Discriminatory Act, the State of Utah is encouraging any religious organization to discriminate on the basis of race, color, sex, religion, ancestry, or national origin, denying equal protection and due process to certain employees, and invading the private right of those employees to practice their religion as they see fit.

By virtue of the statutory provisions of the Equal Employment Opportunity Act, the federal government is unfairly assisting in the establishment of a religion and such assistance is contrary to the policies of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Parker M. Nielson
P.O. Box 510717
655 South 200 East
Salt Lake City, Utah 84151

Shirlene A. Cutler
1465 South Canterbury
Salt Lake City, Utah 84108

APPENDIX A

Section 34-35-5. Utah Code Annotated, 1953:

Anti-discrimination division-Powers and duties. - The Utah antidiscrimination division shall have the following powers and duties:

(1) To appoint such investigators and other employees and agents as it may deem necessary for the enforcement of this chapter and to prescribe their duties.

(2) To adopt, publish, amend and rescind regulations consistent with and for the enforcement of this chapter.

(3) To receive, reject, investigate, and pass upon complaints alleging discrimination in employment, apprenticeship programs, on-the-job-training programs, or vocational schools, or the existence of a discriminatory or unfair employment practice by a person, an employer, an employment agency, a labor organization, or the employees or members thereof, a joint apprenticeship committee, or vocational school.

(4) To investigate and study the existence, character causes, and extent of discrimination in employment, in apprenticeship programs, on-the-job training programs, or vocational schools in this state by employers, employment agencies and labor organizations, joint apprenticeship committees, or vocational schools, and to formulate plans for the elimination thereof by educational or other means.

(5) To hold hearings upon complaint made against a person, an employer, an employment agency, a labor organizations or the employees or members thereof, joint apprenticeship committee, or vocational school; to subpoena witnesses and compel their atten-

dance; to administer oaths and take the testimony of any person under oath; and to compel such employer, employment agency, labor organization, joint apprenticeship committee, or vocational school, official or other person to produce for examination any books and papers relating to any matter invclved in such complaint. Such hearings may be held by the commission itself, or by any commissioner, or by the coordinator, or by any hearing examiner appointed by the commission. If a witness either fails or refuses to obey a subpoena issued by the commission, the commission may petition the district court having jurisdiciton for issuance of a subpoena in the premises and the court shall issue its subpoena; and refusal to obey such subpoena shall be punishable by contempt. No person shall be excused from attending or testifying or from producing records, correspondence, documents or other evidence in obedience to a subpoena in any such matter, on the ground that the evidence or the testimony required of him may tend to incriminate him or subject him to any penalty or forfeiture; but no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which he shall be compelled to testify or produce evidence after having claimed his privilege against self-incrimination, except that such person so testifying shall not be exempted from prosecution and punishment for perjury committed in so testifying.

APPENDIX B

CALVIN L. RAMPTON
GOVERNOR

THE STATE OF UTAH
INDUSTRIAL COMMISSION
AND
UTAH LABOR RELATIONS BOARD
350 EAST 500 SOUTH
SALT LAKE CITY, UTAH 84111

COMMISSION
CARLYLE F. GRONNING
CHAIRMAN
STEPHEN M. HADLEY
JOHN R. SCHONS
GLORIA B. HANNI
ADMINISTRATIVE ASSISTANT

December 10, 1973

Mary Joan Larsen
607 - 8th Avenue
Salt Lake City, Utah

Dear Ms. Larsen:

The Anti-Discrimination Division is sorry we can not handle complaints of Religion pertaining to religious affiliation for a school, college, university or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association or society, or if the curriculum of such school college, university or other educational institution of learning is directed toward the propagation of a particular religion.

However, we have referred your alleged charge to the Equal Employment Opportunity Commission in Denver, Colorado for them to take immediate jurisdiction.

Sincerely,

Marvel A. Wright
Field Representative

MAV:ic

cc: Jack Quintana
R. F. Kirkham

STATES
DEPUTY

APPENDIX C

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
DENVER DISTRICT OFFICE
Sixth Floor, Bess Building
1726 Champa Street
Denver, CO 80202

AREA CODE 303
837-3666

CERTIFIED MAIL NO. 842422
RETURN RECEIPT REQUESTED

July 1, 1974

Mary J. Larsen
607 8th Avenue
Salt Lake City, Utah 84103

Dear Ms. Larsen:

Re: Mary J. Larsen vs. LDS Business College
TDE4-0466

In accordance with your written request and pursuant to Section 706(f) of Title VII of the Civil Rights Act of 1964, as amended, enclosed is a "Notice of Right to Sue" for above referenced case.

Your charge has been dismissed as indicated on the attached Notice of Right to Sue, EEOC Form 161, due to:

☐ No Reasonable Cause:

☐ No Jurisdiction:

☐ Untimely Charge:

☒ Failure to Proceed: Charging Party requested Notice of Right to Sue be issued.

If you have any questions, or we may be of further service, please do not hesitate to contact this office.

Sincerely,

PEDRO ESQUIVEL
Director

Enclosure

cc: See attached sheet

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MARY J. LARSEN, Plaintiff, vs. FERRIS R. KIRKHAM, individually and in his capacity as President of the L.D.S. Business College, et al. Defendants.	)	Civil No. C 74-287 J U D G M E N T

On February 27, 1980, this matter came on for hearing on the parties' request for determination of stipulated issues. Memoranda were submitted and the court elected to consider the request as cross-motions for summary judgment. In light of the court's memorandum decision of September 26, 1980, it is herbey ORDERED that judgment be entered in favor of defendants and that plaintiff's Complaint be dismissed.

DATED this 26 day of September, 1980.

BY THE COURT:

/S/
BRUCE S. JENKINS
United States District Judge

United States District Judge
APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

MARY J. LARSEN, Plaintiff, vs. FERRIS R. KIRKHAM, individually and in his capacity as President of L.D.S. Business College, et al. Defendants.	)	Civil No. C 74-287 MEMORANDUM and ORDER

This case has a checkered history. Plaintiff, advancing several theories of relief, filed a complaint alleging that she has been discriminated against on the basis of her sex and her religion in connection with her employment as a teacher at the defendant L.D.S. Business College. Thereafter, the case was presented to a jury over which The Honorable Willis W. Ritter presided. At the close of trial, plaintiff's counsel stated to the court that the plaintiff had abandoned her claims surrounding the alleged sex discrimination (transcript of proceedings of March 17, 1976 at p. 206). Thereafter, the parties agreed to waive the jury and stipulated

that Judge Ritter might determine the merits of the case upon the evidence and the post-trial memoranda thereafter submitted. Judge Ritter took the case under advisement but died prior to rendering a decision.

In November of 1977, the case was assigned to The Honorable Fred M. Winner, Chief Judge of the District of Colorado, Sitting by designation in the District of Utah. The parties stipulated that Judge Winner might enter judgment on the merits on the basis of the evidence and testimony presented at trial and the arguments and memoranda of the parties. The defendants filed supplemental memoranda. Later, however, in a letter to plaintiff's counsel, Judge Winner announced that he would take no action in the matter for the reason that it was his understanding that determination of the case required only resolution of questions of law, and that contrary to his understanding, counsel for the State of Utah had represented the existence of remaining factual issues.

The undersigned judge as successor to Chief Judge Ritter succeeded also to this case. Once again the parties stipulated that the court could make a determination as to issues involved, only this time the parties presented the court

with a list of narrowly drawn legal issues, a list of stipulated facts and a request that the court determine the issues presented and set for trial any remaining issues. Once again supplemental memoranda were filed, and argument was heard. The court then took the matter under advisement.

The court elects to treat the parties' pending motions as cross-motions for summary judgment. As the age of the case eloquently demonstrates, the parties have had ample opportunity to brief the legal questions involved. As to factual questions, none that control appear in dispute. As noted above, plaintiff has abandoned her claim based upon sex discrimination. Her remaining factual allegations so far as relevant will, for the purpose of this decision, be taken as true, i.e. that the L.D.S. Business College, the Corporation of the President of the Church of Jesus Christ of Latter-Day Saints (Mormon), and individual defendant officers of each, agreed not to renew plaintiff's teaching contract at the L.D.S. Business College based upon their perception that the plaintiff, although a professed Mormon, was insufficiently involved in ecclesiastical activities to justify her retention as a teacher at a church school.

In the court's view, the issues requiring resolution are (1) whether the actions of defendants give rise to a remedy under either 42 U.S.C. § 1983 or § 1985; (2) whether provisions exempting religious educational institutions from the proscriptions of both Title VII[1/] and the Utah Anti-Discrimination Act[2/] are unconstitutional, and (3) whether a three-judge court need be convened to hear such claims of unconstitutionality. In view of the court's rulings as to these issues, defendants' assertion that plaintiff's claims under Title VII are barred by the statute of limitations need not be decided.

I. 1983 CLAIM

Among other things, plaintiff claims that defendant's refusal to renew her employment contract -- to hire her -- constituted a violation of 42 U.S.C. § 1983 in that her constitutional right to free exercise of religion was thereby denied. To begin with, it is clear that she had neither tenure nor was she employed by the State of Utah. In short, there are no due process claims asserted. See Board of Regents v. Roth, 408 U.S. 564 (1972). Requisite to a 1983 cause of action is that the alleged deprivation of rights occur "under color" of state law. Plaintiff concedes that the limited financial

assistance which L.D.S. Business College receives from the State of Utah is insufficient to establish a nexus between the state and the defendant's alleged acts of discrimination so as to constitute "state action." However, she asserts state action is present in the form of Utah's Anti-Discrimination Act, which, in her view, encouraged the defendants to discriminate against her.

There is no dispute that the Utah Anti-Discrimination Act does not forbid the acts complained of here. First, the definition of "employer" contained in § 34-35-2(5) totally excludes from the reach of the Utah Act religious organizations or their wholly-owned subsidiaries.[3/] Furthermore, § 34-35-6(2)(b) specifically excludes religious schools from the Act's prohibition of religious discriminaion.[4/] Plaintiff recognizes that if a policy of state neutrality is expressed in statutory form, such does not necessarily tint the discriminatory acts of discriminating persons with "color" of state law. Plaintiff contends however that where a statutory expression of neutrality with respect to private discrimination has the effect of authorizing discrimination previously prohibited, it so encourages and involves the state in such

private discrimination that the "state action " requirement of § 1983 is satisfied.

It is clear that § 1983 reaches some actions taken by private persons under state authority. See, United States v. Classic, 313 U.S. 299 (1941); Milonas, et al. v. Williams, et al., C 78-0352 (D.Utah 1980). It is also true that several courts, including the United States Supreme Court, have found "state action" in situations where private action receives its authority from state legislation which when enacted, changed then existing contrary state law. In Reitman v. Mulkey, 387 U.S. 369 (1967), a case relied upon by plaintiff, the Supreme Court affirmed a California Supreme Court finding of "state action" in a California initiated measure enacted on a statewide ballot, which expressed a policy of neutrality as to private discrimination in residential housing and thereby repealed existing legislation prohibiting such discrimination. There, however, the court considered the "repeal of existing law" as only one "factor" to consider in determining the extent of California's involvement.

> Here we are dealing with a provision which does not just repeal an existing law forbidding private racial discriminations. Section 26 was intended to

> authorize and does authorize, racial discrimination in the housing market. The right to discriminate is now one of the basic policies of the state. 369 U.S. at 381.

Even if it is assumed that "state action" follows a fortiori from enactment of a law which repeals, changes or conflicts with then existing laws to the contrary, such is without application in this case.

Plaintiff acknowledges that the common law of Utah did not prohibit private employers from discriminating on the basis of religion. She claims that the Utah Act's religious organization exemption, when enacted, was broader than the analogous exemption contained in § 702 of the Civil Rights Act of 1964[5/] as it then existed, and that as a result of this conflict, the Utah Act encouraged what was then prohibited by federal law. As originally enacted, the exemption contained in § 702 provided in part as follows:

> This title shall not apply ... to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporations, association or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connect-

> ed with the educational activities of such institution. (Emphasis added.)

Subsequently, Utah passed its Anti-Discrimination Act which provided for the complete exemption of religious organizations. Thereafter, and prior to the acts of the defendants at issue here, Congress amended § 702 so that it presently reads, in relevant part:

> This Subchapter shall not apply ... to a religious corporation, association, educational institution or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its acitivities.

Plaintiff observes that § 702, as originally enacted, provided limited exemption to religious organizations from Title VII's prohibition of religious discrimination. Such exemption related to the organizations "religious activities". The Utah Act's exemption, on the other hand, draws no distinction between religious and non-religious activities, but provides a complete exemption to religious organizations. It is upon this asserted inconsistency plaintiff bases her claim that the Utah Act encouraged the defendants to discriminate against her. Since, in her view, the teaching of English at a religious school is not a "religious activity", she asserts that § 702 as originally enacted prohibited the type of activity engaged in by the

defendants here, but that the Utah Act exempted such activities and thereby involved the state in the acts of the defendant and provided the required "color of state law."

Ignoring the difficulty plaintiff encounters in asserting that the "repeal of existing law" theory of state action can be applied to a situation where state law conflicts with controling federal law, plaintiffs argument must fall. First, at the time of the acts complained of here, § 702 and the Utah exemption were in accord. Under both acts, religious organizations could discriminate on the basis of religion with respect to religious and non-religious activities alike. Thus, even assuming that, when enacted, the Utah Act conflicted with Title VII, plaintiff's argument that this hiatus in uniformity had effect beyond the time at which the laws converged is, at best, tenuous. Moreover, Title VII has since its inception, excluded from its coverage the type of activity engaged in by defendants. Section 702, as enacted, provided a complete exemption for educational institutions insofar as the religious activities of such institutions are concerned. Thus at the time of the enactment of the Utah Anti-Discrimination Act, the school could have, consistent with Title

VII, refused to employ any person for any reason in the furtherance of its educational activities, be they religious or non-religious. Finally, § 703(e) of the Civil Rights Act of 1964[6/] then provided and still provides that a religious school may discriminate on the basis of religion with respect to any of its activities, religious or non-religious, educational or non-educational.

In view of the foregoing, there can be no real argument that the Utah Act and Title VII were in conflict insofar as they related to the facts presented here. Thus, since the Utah Act provided the defendants with no more relevant freedom to discriminate than they possessed under either the common law of Utah, or under Title VII, it can not be said that the Utah Act's exemption constitutes "state action" for the purposes of a claim under § 1983. State action there was not.

II. CONSTITUTIONALITY OF STATE AND FEDERAL EXEMPTIONS.

Before proceeding to the merits of this challenge there is the question of whether it is necessary to convene a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2282. Those sections, now repealed, apply to actions such as this commenced prior to the effective date of repeal and

together prohibit the granting of an injunction restraining the enforcement, operation or execution of a state statute or an Act of Congress on the grounds of unconstitutionality unless the matter has been determined by a three-judge district court. It is well settled, however, that an action seeking solely declaratory relief, and not an injunction, may be heard by a single judge. Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963); Hall v. Garson, 430 F.2d 430 (5th Cir. 1970).

In the instant case, plaintiff asserts a challenge to the constitutionality of certain provisions of both Utah and federal law which purport to exempt religious schools from the operation of statutes prohibiting religious discrimination in employment. The parties agree, and the court concurs that the relief sought here is properly characterized as declaratory. Plaintiff does not seek to suspend enforcement of legislation, but only to enjoin defendants from discriminating against her in reliance on legislation. No state or federal officers are sought to be enjoined, only school officials. Therefore, plaintiff's challenge may properly be tried by a single judge.

Turning now to the merits, plaintiff

requests this court to declare unconstitutional certain of the several provisions of Title VII and Utah Act which purport to permit the acts of discrimination committed by the defendants. Before proceeding to the particulars of this claim, some statutory exposition is again warranted. Title VII as enacted contained a two-tiered exemption framework for religious organizations and educational institutions. Section 702, the first tier, provided separate exemptions for each. Religious organizations were not prohibited from discriminating on the basis of religion in the employment of those hired to assist in the organization's religious activities. Educational institutions were not, under § 702, restrained from discriminating on any basis when employing those for work in connection with the school's educational activities. Section 703(e), the second tier, exempted educational institutions owned or operated by religious organizations to an extent where they were not prohibited from practicing religious discrimination with respect to any facet of their activities. The 1972 amendments to Title VII, the Equal Employment Opportunity Act, altered this framework. Section 702 was amended such that the exemption provided educational institutions was abolished,

but the religious organization exemption was extended so as to exclude from Title VII coverage all acts of religious discrimination in employment, regardless of the type of activity involved. Section 703(e) was left unchanged.

The Utah Act, on the other hand, provides a far broader exemption to religious organizations. Although § 34-35-6(b) of that Act contains language identical to that contained in Title VII's § 703(e), it is largely superfluous in that, by virtue of the definition of "employer" contained in § 34-35-2(5), religious organizations and their wholly-owned subsidiaries are totally exempt from compliance with the Act. Against this background of numerous, and arguably overlapping exemptions, plaintiff urges that both Title VII and the Utah Act can be pared in places and construed in others so as to prohibit the religious discrimination at issue here. To this end, plaintiff first seeks a declaration that the exemption presently allowed in Title VII's § 702, to the extent that it permits religious organizations to practice religious discrimination in connnection with activities other than religious activities, is unconstitutional as in conflict with the Establishment Clause of the First Amendment and the guarantee of equal protection

contained in the Due Process Clause of the Fifth Amendment. Thus, plaintiff contends § 702's present provision was not effective to repeal the exemption contained in original § 702, and that original § 702, with its "religious activities" limitation, should be revived as the only valid expression of legislative intent. Since, in plaintiff's view, the teaching of secular subjects at the college is not a "religious activity" of the L.D.S. Church, she argues that § 702 does not exempt defendants from Title VII liability.

Plaintiff next turns her focus to the complete exemption provided religious organizations and their subsidiaries in §34-35-2(5) of the Utah Act. Plaintiff argues that this too should be declared unconstitutional as an establishment of religion[7/] and a denial of equal protection. In addition, she claims that to the extent it permits religious organizations to practice discrimination which is prohibited by Title VII, i.e. on account of race, color, sex, or national origin, Title VII pre-empts it.

Finally, plaintiff confronts the "religious educational institution" exemption contained in both § 703(e) of Title VII and 34-35-6(2)(b) of the Utah Act. Plaintiff would have

the court construe this exemption to permit a religious organization to hire its own members to teach in its schools, but not to allow it to discriminate among such members on the basis of their conformance to an ideal of religious practice. But for this construction, plaintiff asserts that this exemption too must fall on First Amendment and equal protection grounds.

At the outset, it appears that the court can confine its analysis to plaintiff's challenge to the religious school exemption contained in Title VII's § 703(e) and adopted in § 34-35-6(2)(b) of the Utah Act. These sections have direct application to the situation presented here, and if they can withstand plaintiff's constitutional attack, the court need not inquire into the validity of the more general exemptions even though the latter might have application as well.

It is plaintiff's theory, as noted above, that this religious school exemption can be rescued by narrow construction. Specifically, plaintiff argues that while the Constitution would permit the L.D.S. Business College to hire only members of the L.D.S. Church, it does not permit the "internal control" of such members by conditioning their employment upon adherence to

minimum standards of church participation. In this regard, plaintiff urges the court to apply the definition of "religion" found in § 701(j) [8/] to the word "religion" as it appears in the religious school exemption. Section 701(j) provides:

> The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he us unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

It is plaintiff's contention that the religious school exemption, when read in conjunction with § 701(j)'s requirement of reasonable accommodation, would apply only in those instances where a teacher's "religious belief is ... a significant factor in the particular subjects being taught. ..." (plaintiff's post-trial memorandum at 29). Neither of plaintiff's proposals is consistent with the legislative purpose in providing the exemptions.

First, her notion that the religious school exemption permits no more than a religious school's preference for those ostensibly affiliated with the religion operating it ignores both reason and policy. It implies that the practice

of religion is something separate from what is meant by the term "religion" as it appears in § 703(e). This is clearly at odds with the definition of "religion" contained in § 701(j) and which plaintiff urges the court to apply to the term "religion" as it appears in the exemption. Furthermore, it is inconceivable that the exemptions would purport to free religious schools to employ those who best promote their religious mission, yet shackle them to a legislative determination that all nominal members are equally suited to the task. In short, nothing in the language, history or purpose of the exemption supports such an invasion of the province of a religion to decide whom it will regard as its members, or who will best propagate its doctrine. That is an internal matter exempt from sovereign interference.

Similarly unsupportable is plaintiff's attempt to impose 701(j)'s duty of reasonable accommodation upon exempt religious schools. The short answer to this contention is that the duty to accommodate applies only to those employers who are prohibited from religious discrimination. The import of § 701(j) is to equate the failure to accommodate with discrimination. Thus it makes no sense to provide that religious schools

may discriminate on the basis of religion, yet require them to accomodate to divergent religious practice or belief. Essentially, the interpretation plaintiff urges here is nothing more than a request that the court construe away the religious school exemption.

As set forth above, it is plaintiff's view that absent the court's adoption of her limiting construction of the religious school exemption, it is unconstitutional insofar as it permits a "religious organization to use its educational institution for purposes of internal control of [its] members." However she provides literally no support for this assertion. The court would be inclined to correct the deficiency by assuming that plaintiff intended that her arguments attacking the constitutionality of § 702 were to apply with equal force to the religious school exemption, but for the fact that the plaintiff allows that the Constitution does not prohibit legislation permitting a religious organization to staff its school with its own members. Plaintiff fails to detail the constitutional nuances which permit a religious organization to hire its own members to teach, but prohibit it from refusing to retain nominal members who are perceived as not in conformity

with the currently expressed ideals of religious practice. This court can't fill that void. Therefore, and since the court is of the view that neither the equal protection clause nor the establishment clause checks the power of the legislature to permit a religious school, be it Mormon, Roman Catholic, Jewish, Protestant or otherwise, the freedom to consider religious practice and belief when hiring its teachers, plaintiff's challenge of the exemption fails.

III. 1985 CLAIMS.

Plaintiff also claims that defendant Kirkham violated 42 U.S.C. § 1985(3) when he refused to renew her contract. She alleges that he met with the assistant Commissioner of Education for the Mormon Church, not a party to this action, for the purpose of discussing plaintiff's religious activities, and that the two of them conspired to release her from her employment at the college. Assuming that evidence adduced at trial reveals the existence of a conspiracy, § 1985(3) avails plaintiff no relief. Section 1985(3) provides a remedy to those injured by conspiracies formed "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and

immunities under the laws." Although plaintiff does not identify the deprivation she suffered by virtue of the alleged conspiracy, the court assumes that plaintiff would urge that the alleged conspiracy deprived her of right to the free exercise of her religion under the First and Fourteenth Amendments. However, those amendments proscribe only government interference with religious beliefs. Although the court recognizes that the United States Supreme Court has ruled that the reach of § 1985(3) extends to purely private conspiracies, see Griffin v. Breckenridge, 403 U.S. 88 (1971), a private conspiracy to be actionable under § 1985(3) must nonetheless deprive a person of a right shielded from private action by law. Section 1985 is itself no aegis, but only provides a remedy for violations of those rights which it designates. See, Great American Federal Savings and Loan Association v. Nototny, 442 U.S. 366 (1979). Since plaintiff has no right either under the Constitution or the laws to be free from private religious discrimination by the L.D.S. Business College, her Complaint does not state a claim under § 1985(3).

In sum, plaintiff fails to state a claim under § 1983, § 1985 or Title VII. Therefore, based upon the foregoing, it is hereby ORDERED

that plaintiff's Complaint be in all respects dismissed. Let Judgment be entered in accordance herewith.

DATED this 26 day of September, 1980.

BY THE COURT:

/S/
BRUCE S. JENKINS
United States District Judge

FOOTNOTES

1/ 42 U.S.C. § 2000e et. seq.

2/ Section 34-35-1 et. seq., Utah Code Annotated (1953).

3/ "Employer" ... does not include religious organizations or associations, religious corporations sole, nor any corporation or association constituting a wholly owned subsidiary or agency of any religious organization or association or religious corporation sole ... 34-35-2, Utah Code Ann. (1953).

4/ It shall not be a discriminatory or unfair employment practice: 2(b) For a school, college, university or other educational insititution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution of learning is, in whole or in substantial part, owned, supported, controlled or managed by a particular religious corporation, association or society, or if the curriculum of such school, college, university or other educational institution or institution of learning is directed toward the propagation of a particular religion. 34-35-6(2)(b), Utah Code Ann. (1953).

5/ 42 U.S.C. § 2000e-1.

6/ 42 U.S.C. 2000e-2(c). This section contains language identical to that found in § 34-35-6(2)(b) Utah Code Ann., supra, note 4.

7/ In support of her contention that the exemptions contained in § 702 of the 1964 Civil Rights Act and in 34-35-2(5) of the Utah Act violate the Establishment Clause, plaintiff relies exclusively on the case of King's Garden, Inc. v. F.C.C. 498 F.2d 51 (D.C. Cir. 1974). In that case, a panel of the United States Court of Ap-

peals for the District of Columbia expressed the opinion that the 1972 version of § 702's exemption, covering all of the activities of any religious organization, is of "doubtful constitutionality." However, the court there was concerned with the fact that § 702 would permit religious discrimination by religious organizations in even the most secular of their endeavors. Implicit in the opinion is that court's approval of an exemption for religious schools.

> The sponsors of the 1972 exemption were chiefly concerned to preserve the statutory power of sectarian schools and colleges to discriminate on religious grounds in the hiring of all their employees. But the exemption's simple and unqualified terms obivously accomplish far more than this. ... If a religious sect should own and operate a trucking firm, a chain of motels, a race track, a telephone company, a railroad, a fried chicken franchise, or a professional football team, the enterprise could limit employment to members of the sect without infringing on the Civil Rights Act. Id. at 54.

King's Garden is thus distinguishable from the instant case and supports this court's view that the Establishment Clause does not bar a legislature from permitting sectarian schools to discriminate on the basis of religion in the hiring of teachers.

8/ 42 U.S.C. 2000e(j).

APPENDIX F

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-2152

MARY J. LARSEN Plaintiff-Appellant, v. FERRID R. KIRKHAM, individually and in his capacity as President of the L.D.S. Business College, et al. Defendants-Appellees.	)	Appeal from the United States District Court For the District of Utah (Civil No. C 74-287)

Shirlene A. Cutler, Salt Lake City, Utah, for Plaintiff-Appellant.

Dan S. Bushnell (Larry R. White, with him on the brief), of Kirton & McConkie, Salt Lake City, Utah, for Church Defendants-Appellees.

Joseph P. McCarthy, Assistant Attorney General for the State of Utah, Salt Lake City, Utah, for State Defendants-Appellees.

December 20, 1982

Before SETH, Chief Judge, LOGAN and SEYMOUR, Circuit Judges.

PER CURIAM.

This appeal comes from the trial court's summary judgment against the plaintiff Mary J. Larsen. The plaintiff advanced several theories of relief alleging that she had been discriminated against on the basis of religion in connection with her employment as a teacher at the L.D.S. Business College.

The College is a nonprofit Utah corporation, and is is entirely controlled by the Church of Jesus Christ of Latter-day Saints. Mary Larsen was hired as a part-time instructor in English at the College in 1970. The plaintiff was hired on one-year contracts for the 1971-1972 and 1972-1973 school years to teach English at the College. Although a member of the Mormom Church it seems the plaintiff did not attend church regularly not tithe. In the spring of 1973 the plaintiff was notified by

defendant Kirkham, president of the College, that she would not receive a contract for the next school year. The trial court accepted as true plaintiff's allegation that she was not rehired because it was the perception of her employers that although a Mormon, she was insufficiently involved in ecclesiastical activities to justify her retention as a teacher at a Church school.

The plaintiff filed a discrimination charge with the Antidiscrimination Division of the Utah State Industrial Commission. The Commission believed the College was excluded or exempt from such claim under the Utah Anti-Discrimination Act and the Civil Rights Act of 1964 because the College was owned in whole or in part by a religious institution and forwarded the complaint to the EEOC office in Denver. The EEOC issued the plaintiff a right to sue notice.

This action was commenced against the College, its president, the commissioner of education of the Mormon Church, the Corporation of the President of the Mormon Church, the Utah State Industrial Commission, one of its commissioners, and the Utah Attorney

General. The case was presented to a jury, but the parties then waived the jury. Judge Ritter was presiding, but died before rendering a decision. The case was next assigned to Judge Winner, and finally to Judge Jenkins. The parties filed a Stipulation and Order presenting the court with a list of narrowly drawn legal issues and list of facts. The parties requested the court to determine the issues presented and set any remaining issues for trial. The court treated the pending motions as cross-motions for summary judgment. In granting summary judgment for the defendants the court determined that the provisions of the Utah Act and Title VII that the plaintiff attacked were constitutional; that plaintiff had no proper 42 U.S.C. Section 1983 claims because there was no state action; and that there was no private conspiracy actionable under 42 U.S.C. Section 1985(3).

The plaintiff argues that the exemptions and exclusions provided religious institutions as to their hiring practices in the Utah Act, and in the 1972 amendment to the Civil Rights Act of 1964, section 702

(42 U.S.C. Section 2000e-1), violate the equal protection clause of the Fourteenth Amendment. The Fourteenth Amendment's equal protection clause does reach all exclusions which single out any class of persons for different treatment which is not based on a resonable classification. Leggroan v. Smith, 498 F.2d 168, 170 (10th Cir.). The plaintiff has failed to demonstrate how the sections she attacks which keep the state and federal government out of the hiring practices and regulation of the religious educational institutions are not reasonable. We agree with the district court's view "that neither the equal protection clause nor the establishment clause checks the power of the legislature to permit a regligious school, be it Mormon, Roman Catholic, Jewish, Protestant or otherwise, the freedom to consider religious practice and belief when hiring its teachers."

The plaintiff argues that the defendants' refusal to renew her employment contract violated 42 U.S.C. Section 1983 because such action deprived plaintiff of her constitutional right to the free exercise of her

religion. To prevail under section 1983 the plaintiff had to show that her alleged deprivation occurred under color of state law. Plaintiff conceded that the limited financial assistance the College receives from Utah fails to constitute state action. However, the plaintiff asserts that there is state action because Utah through its Anti-Discrimination Act impermissibly encourages religious institutions to discriminate as the College discriminated against the plaintiff. The plaintiff asserted below and still maintains that Utah through its statute encourages discrimination because the Utah Act allows a broader religious institution exemption than did the original section 702 of the federal law. The trial court appropriately pointed out that at the time relevant to plaintiff's complaint the federal and Utah exemptions were in accord. Further, Title VII since its enactment has excluded or exempted from its coverage the activity of the defendants of which she complains. The exemption in the Utah Act goes no further than that in the federal law and thus the Utah Act's exemption does not constitute state action by encouraging

private discrimination.

The plaintiff also contends that defendant Kirkham violated 42 U.S.C. Section 1985(3) (conspiracy to interfere with civil rights) when he refused to renew her contract. Plaintiff maintains that defendant Kirkham met and conspired with others in deciding to release her from employment at the College, which she contends deprived her of the "the equal protection of the laws, or of equal privileges and immunities under the laws." In fact the plaintiff failed to identiy the deprivation she suffered because of this "conspiracy." The trial court assumed "that plaintiff would urge that the alleged conspiracy deprived her of right to the free exercise of her religion under the First and Fourteenth Amendments." 499 F. Supp., at 967. However, since plaintiff has no right under the constitution nor the laws to be free from private religious discrimination by the Church Colege and its officials in their hiring practices she has no proper section 1985(3) claim.

We have considered appellant's other contentions and find them to be without merit. AFFIRMED.

APPENDIX G

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 80-2152

MARY J. LARSEN Plaintiff-Appellant, v. FERRID R. KIRKHAM, individually and in his capacity as President of the L.D.S. Business College, et al. Defendants-Appellees.	)	# 80-2152

This matter having come on for rehearing upon consideration whereof the petition for rehearing is denied.

Howard K. Phillips
Clerk, Tenth Circuit Court

November Term, January 18, 1983

CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was hand delivered to the offices of the following on or before the 20th day of April, 1983.

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Mr. Joseph P. McCarthy
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115 State Capitol
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/S/
Shirlene A. Cutler

CERTIFICATE OF SERVICE:

I hereby certify that a true and correct copy of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was hand delivered to the offices of the following on or before the 16th day of July

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Shirlene A. Cutler

No. 83-92

In the Supreme Court of the United States

October Term, 1983

MARY J. LARSEN,

Petitioner,

vs.

R. FERRIS KIRKHAM, et al.,

Respondents.

BRIEF OPPOSING CERTIORARI

Attorneys for respondents LDS Business College, R. Ferris Kirkham, Neal A. Maxwell, and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints:

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Civil Rights Act of 1964, Title VII, §§ 702 and 703, 42 U.S.C. §§2000e-1 and 2000e-2(e)(2), and the Utah Antidiscrimination Act, Utah Code Ann. §34-35-2, may constitutionally permit a school sponsored and controlled by a church to insist that the school's teaching employees are members in good standing of the church.

2. Whether officers of a church and of a school sponsored and controlled by the Church, who did not renew plaintiff's teaching contract because she was not a member of the Church in good standing, have deprived plaintiff of federal rights under color of state law for purposes of 42 U.S.C. § 1983 and § 1985.

LIST OF PARTIES

Omitted under Supreme Court Rule 34.2.

TABLE OF CONTENTS AND AUTHORITIES

Authorities

No. 83-92

In the Supreme Court of the United States

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Respondents.

BRIEF OPPOSING CERTIORARI

Attorneys for respondents LDS Business College, R. Ferris Kirkham, Neal A. Maxwell, and the Corporation of the President of the Church of Jesus Christ of Latter-day Saints:

CITATIONS TO DECISION AND JUDGMENT IN COURTS BELOW

The trial court, upon what it deemed cross motions for summary judgment, entered judgment for defendants. *Larsen v. Kirkham*, 499 F. Supp. 960 (D. Utah 1980). Upon appeal to the Court of Appeals for the Tenth Circuit, the judgment was affirmed on December 20, 1982, in an unpublished decision, and rehearing was denied January 18, 1983.

JURISDICTION

Omitted under Supreme Court Rule 34.2.

STATUTES AND CONSTITUTIONAL PROVISIONS

Omitted under Supreme Court Rule 34.2.

STATEMENT OF THE CASE

L.D.S. Business College (hereinafter the College) is a nonprofit corporation wholly owned and controlled by the Church of Jesus Christ of Latter-day Saints (R-I-178, §3(b)) which is sometimes referred to as the Mormon Church. At the time of the events referred to in the complaint, Neal A. Maxwell, one of the defendants, was the Commissioner of Education of the Church Education System, which included L.D.S. Business College and several other schools operated by the Church. R. Ferris Kirkham, another defendant, was president of L.D.S. Business College, under the authority of Commissioner Maxwell but not directly supervised by him. (R-II-118)

A substantial part of the mission of the school is to teach the religious values of the Church. (R-II-Tr. 73-74, 150) All full-time students are required to take religious instruction. Mr. Kirkham testified at trial—

> If it were not for the religious program, the Church would not operate the college. (R-II-Tr. 113)

The college requires the members of its faculty to be good examples of the application of the teachings of the Church in their private and public lives.

When the plaintiff applied for full-time employment at the College, she submitted a written application in which she stated that she "adher[ed] to the personal standards of the Church and support[ed] it spiritually, financially and intellectually." (R-II-Tr. 27) In checking her references, Mr. Kirkham found that she had not been an active Church member, but plaintiff agreed that she "was willing to become active in order to be employed by the College. (R-II-Tr. 106-07) Plaintiff was employed for the 1971-72 school year but did not become a more active participant in the Church. She was rehired for the following year "with the stipulation that she accept a probationary period relating to her religious activity." (R-II-Tr. 118) Plaintiff admits that she did not live up to the personal standards of the Church during the period in which she was employed by the College. (R-II-Tr. 36)

At the end of the 1972-73 school year, plaintiff was notified that she would not be reappointed for the succeeding year. She appealed to Kenneth Beesley, an associate commissioner of the Church Education System and of the College, who was the immediate supervisor of President Kirkham who sustained the decision not to offer her a contract for another year. (R-II-Tr. 155-57) Plaintiff promptly hired an attorney to represent her, and the College gave her a written notice that she would not be rehired on May 9, 1973. (R-II-Tr. 38, 67-68) Plaintiff's Contract expired on August 31, 1973. She filed a claim with the EEOC on November 28, 1973, received a right-to-sue letter in July, 1974, and filed this action in District Court in September, 1974.

The complaint alleged a charge of religious discrimination, and sex discrimination under the Civil Rights Act of 1964, a violation of 42 U.S.C. §1983 and §1985, violation of her right to privacy, and several other theories. All these claims except the religious discrimination claim and the claim of violation of 42 U.S.C. §§1983 and 1985 were dropped by plaintiff before judgment was entered. (R-II-Tr. 205-06, Plaintiff's Post Trial Memorandum at 2, R-I-136) The matter was tried in March, 1976, to a jury before Judge Willis W. Ritter. On the last day of the trial the jury was waived by the parties and the matter was submitted to Judge Ritter, who died thereafter without reaching a decision.

The case ultimately came to rest in the hands of Judge Bruce S. Jenkins, who ruled on opposing motions for summary judgment based upon the transcript of the 1976 trial and also upon a stipulation of issues remaining to be decided and facts agreed to with regard to those issues. (R-I-175)

SUMMARY OF THE ARGUMENT

Section 702 of Title VII, the Civil Rights Act of 1964, exempts the defendant LDS Business College from regulation by the Equal Employment Opportunity Commission (EEOC) with respect to the consideration of religious qualifications for employment. Petitioner seeks to have this provision and the related provisions in section 703, codified at 42 U.S.C. §2000e-2(e)(2) stricken as unconstitutional. The employment of teachers by church schools like LDS Business College is a particularly sensitive activity of a religious organization, be-

cause the teachers in such schools are advocates of the teachings of the Church as well as teachers of secular subjects. Serious questions of interference with First Amendment rights of churches are raised here, and petitioner has failed to show a sufficient basis for a grant of certiorari to give a full-scale review of these sections of Title VII.

Petitioner seeks also to obtain relief under the Civil Rights Act of 1866, 42 U.S.C. §§1983 and 1985, which require a showing of state action. There is no evidence or allegation that the defendant LDS Business College was under the control or direction of the state, and the personnel decision of which petitioner complains was clearly made independently of state action. No other basis for state action appears other than that church schools are permitted under Utah law to prefer their own members in good standing for teaching positions. Thus the decision of LDS Business College not to extend another one-year contract to petitioner is not fairly attributable to the state and not state action.

POINT ONE

IT IS CONSTITUTIONAL TO PERMIT A CHURCH SCHOOL TO INSIST THAT THE SCHOOL'S TEACHERS ARE MEMBERS IN GOOD STANDING OF THE CHURCH

Plaintiff has invoked constitutional review of statutes which exempt church-related schools from the Civil Rights Act of 1964 for a limited purpose of permitting them to select their faculty upon a standard of religious

preference. By urging the court to hold these laws unconstitutional, plaintiff requests the court to undertake "the gravest and most delicate duty that this Court is called on to perform." *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Justice Holmes), *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The decision of Congress expressed in the challenged exemptions, 42 U.S.C. 2000e-1(e)(2) and 2000e-2(e)(2), should be accorded great weight, even where the act implicates fundamental constitutional rights. *See, Fullilove*, supra, at 472, 65 L.Ed 2d at 920, *CBS v. Democratic National Committee*, 412 U.S. 94, 102 (1973).

Plaintiff argues essentially that to permit the defendant college to insist upon its religious standards impinges upon her private religious life, and that to retain her job she would have been required to do things in which she did not believe. This is nothing more than a statement that the school has used a religious test to reach its decision not to reappoint her, an outcome which is specifically permitted by the statutory exemptions which she challenges. Plaintiff was employed on a one-year contract and presents no basis for a claim arising from the decision not to extend a new contract other than the allegation that the decision was made because of a judgment that she was not complying with the school's religious-based standards.

The exemption challenged by plaintiff is similar to that at issue in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), where the National Labor Relations Board had asserted jurisdiction over some parochial

high schools rejecting arguments of the church schools that a violation of the First Amendment arose from the NLRB claim of jurisdiction over them. The court stated—

> In recent decisions involving aid to parochial schools we have recognized the critical and unique role of the teacher in fulfilling the mission of a church-operated school. What was said of the schools in *Lemon v. Kurtzman*, 403 U.S. 602, 617 (1971), is true of the schools in this case: 'Religious authority necessarily pervades the school system.' The key role played by teachers in such a school system has been the predicate for our conclusions that governmental aid channeled through teachers creates an impermissible risk of excessive governmental entanglement in the affairs of the church-operated schools . . .

Catholic Bishop, 440 U.S. at 502. The court quoted a remark of Justice Douglas, concurring in *Lemon v. Kurtzman*, supra, who noted "the admitted and obvious fact that the raison d'etre of parochial schools is the propagation of a religious faith." *NLRB v. Catholic Bishop of Chicago*, 440 U.S .at 503. President Kirkham testified in the case at bar that religious instruction was the prime reason for which the Church operates the L.D.S. Business College. In the *NLRB v. Catholic Bishop* decision, the court reached the conclusion that—

> The church-teacher relationship in a church-operated school differs from the employment relationship in a public or other nonreligious school. We see no escape from conflicts flowing from the Board's exercise of jurisdiction over teachers in church operated schools and the consequent serious First Amendment questions that would follow.

Id. at 504

Plaintiff seeks here to have the court establish jurisdiction of the EEOC and the courts over the employment of teachers by religious schools, a result diametrically opposed to the constitutional reasoning of *NLRB v. Catholic Bishop*. It is precisely the issue of measuring the suitability of teachers for service in the peculiarly religious mission of schools operated by churches which plaintiff would bring under governmental regulation. Plaintiff would flatly prohibit church schools from exercising discretion in hiring based upon the very values which were viewed as the basis for "serious First Amendment questions" in the NLRB case. While the NLRB sought to establish control of employer-employee relations, plaintiff seeks to go one step further and require church schools to hire persons to teach without giving attention to the class of qualifications considered most important by the churches involved and which are most central to the constitutionally protected function of such schools, namely, the loyalty and effectiveness of the employee teacher as a steward and representative of the church.

Plaintiff can draw no support from *King's Garden v. FCC*, 498 F.2d 51 (D.C. Cir. 1974), which she mistakenly cites as authority for the proposition that the exemptions which she challenges are unconstitutional. The *King's Garden* case was about whether the exemptions of religious organizations from the Civil Rights Act of 1964, Title VII, in matters of religious discrimination in employment had created a similar exemption in the powers of the FCC to regulate broadcast licensees under the Communications Act. The court in *King's Garden* concluded that there was no such exemption in

the Communications Act and that the constitutional validity of the Civil Rights Act was not at issue, but delivered in dicta a criticism of the 1972 amendments to the Civil Rights Act which broadened the exemption of religious organizations, permitting them to use a religious test in hiring all employees and not just those directly engaged in the religious activities of the organization.

Under the Civil Rights Act as originally adopted in 1964, however, church schools were permitted to discriminate in employment in favor of persons meeting a religious test. The Church College was exempt under the statute as written in 1964. And prior to 1972, in the opinion of the *King's Garden* court, "Congress had, in our view, a firm purchase on the tightrope." 498 F.2d at 56. Thus the *King's Garden* reasoning does not support petitioner's case here.

The *King's Garden* court also found that the First Amendment requires an exemption of religious organizations from regulation in certain circumstances. The court wrote—

> In addition, the guarantees of Free Exercise, Free Speech, and Free Press no doubt combine to provide a *religious group the right to choose on sectarian grounds those who will advocate, defend, or explain the group's beliefs* or way of life, either to its own members or to the world at large. *Id.* [emphasis supplied]

Petitioner was a person employed by L.D.S. Business College to "advocate, defend or explain" the beliefs and way of life of the Church, with respect to which the

school should be permitted to choose its teachers on sectarian grounds. Respondents conclude that the courts below disposed of petitioner's claim properly and urge the court to deny certiorari.

POINT TWO

THE DECISION NOT TO REHIRE THE PETITIONER DID NOT VIOLATE 42 U.S.C. §§1983 and 1985 BECAUSE IT WAS NOT STATE ACTION.

Petitioner claims that R. Ferris Kirkham and the Church College violated 42 U.S.C. §§1983 and 1985 when she was not rehired for another year. Section 1983 provides—

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Petitioner claims that she has a right or privilege in the case at bar related to her right to worship as she pleases, and that the conduct of the school was state action. Without conceding that plaintiff has a right under the circumstances of this case which is protected by the law or the constitution, it is sufficient to show that the conduct of the school is not state action.

The reasoning applied by this Court recently in *Rendell-Baker v. Kohn*, — U.S. —, 102 S.Ct. 2764 (1982)

conclusively establishes that petitioner's claim must fail. In *Rendell-Baker* the plaintiffs claimed they had been discharged by a school for maladjusted high school students in violation of their rights of free speech. The case was filed in two installments by separate plaintiffs in district court, one judge agreeing that the complaint before him stated a claim and another judge granting summary judgment for the school. The Court of Appeal consolidated the cases and found there was no state action and the Supreme Court affirmed. The Court reasoned that the appropriate analysis where a party alleges certain conduct to be state action is to inquire whether the conduct may be "fairly attributed to the state." While the school received as much as 90% of its support from public sources, and was supervised to some extent by public agencies, these facts did not change the character of the school as a contractor like any other private contractor working for the government, nor did the government involvement extend to participation in decisions to hire and fire teachers.

Petitioner Mary Larsen's claim is weaker than the one which failed in *Rendell-Baker*. The amounts of state aid flowing to students at the college are insignificant; there is no state involvement in personnel decisions, no state regulation of any of the functions provided by the school, and no state contract to purchase the services provided by the school except for government aid programs extended to students at accredited schools generally. The school is exclusively operated under the direction and control of the Church of Jesus Christ of Latter-day Saints. Petitioner has stipulated that the Col-

lege is "wholly owned *and operated*" by the Church. (Stipulation and Motion, R-I-178) [emphasis supplied].

Petitioner's theory is that state action is present in the case at bar because the state of Utah, by exempting Church-owned schools from regulation against religion-based discrimination in employment, has encouraged such discrimination and thereby made such discrimination state action, citing *Reitman v. Mulkey*, 387 U.S. 369 (1967). The *Reitman* decision struck down a California constitutional amendment which authorized private racial discrimination and which reversed the effect of earlier state laws prohibiting discrimination.

Petitioner does not present a case, however, of a malignant and unredeemable form of conduct comparable to race discrimination that is aided by state law, but rather of a balancing judgment reached by the national and state legislatures to accommodate the First Amendment rights of the Church to prefer its members in good standing within its own program. Where the choice not to employ her further was motivated by religious considerations, these considerations were an exercise of the First Amendment rights of the Church, not an exercise of state power.

Furthermore there was no conspiracy in the case at bar comparable to, for example, *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 155-56 (1970), discussed by the Court in *Rendell-Baker* in footnote 6, 102 S.Ct. at 2770. A white teacher was arrested for vagrancy while accompanying six black children to an illegally segregated

lunch counter. The arresting officer had agreed with the store management to make the arrest to further the illegal segregation and thus the acts of the store were fairly attributable to the state. In petitioner's case, however, the allegations that President Kirkham had discussed the case with Neal A. Maxwell, Commissioner of the Church Educational System, were not supported with evidence, and the discussions of President Kirkham with Mr. Beesley, his supervisor, were shown to have been in the nature of a review of his decision not to reemploy the petitioner for succeeding years. These discussions were to some extent initiated and participated in by petitioner for the purpose of obtaining a reversal of the original decision. (R-II-Tr. 38, 126-27, 155-57, 159) Now petitioner ought not to be heard characterizing these discussions as a basis for finding that some of the defendants had formed an iniquitous agreement, a conspiracy, to deprive her of civil rights.

Without a finding of state action, there can be no violation of the Civil Rights Act provisions of 42 U.S.C. §§1983 and 1985, and these respondents respectfully urge the court to deny certiorari in this matter.

CONCLUSION

These respondents have argued to both the trial court and the court of appeals that petitioner's claim under the Civil Rights Act of 1964, Title VII, was barred because not timely filed (R-I-175, 177) and that there were grounds independent of religion for not rehiring petitioner for another year of teaching. (Defendant's Post Trial Memorandum at 37-39, R-I 109-111) *See, Mt. Healthy City Bd. of Education v. Doyle*, 429

U.S. 274, 285-87 (1977). These matters have not been reached but ought to be mentioned as lending further weight to the conclusion that this is not a proper case for certiorari.

Two recent decisions of this court, *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979), and *Rendell-Baker v. Kohn*, — U.S. —, 102 S.Ct. 2764 (1982), have addressed the question of exemptions from regulation of discrimination in employment and state action in private employment discrimination, respectively, under circumstances more appealing for relief than the petitioner has presented. Applying those cases it appears clear that the exemptions from Title VII which petitioner attacks are compelled by constitutional considerations, especially when the circumstances are those of teachers in church sponsored schools, and that the conduct alleged here was not state action.

These defendants therefore respectfully urge the Court to deny certiorari.

Dated this ..... day of September, 1983.

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